

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Request for Review of a Decision of the	)	
Universal Service Administrator and	)	WC Docket No. 06-122
Emergency Petition for Stay by U.S.	)	
TelePacific d/b/a TelePacific	)	
Communication	)	

**OPPOSITION OF U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC  
COMMUNICATIONS TO PETITION FOR CLARIFICATION OR IN THE  
ALTERNATIVE FOR PARTIAL RECONSIDERATION**

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Dated: July 6, 2010

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## EXECUTIVE SUMMARY

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) requests that the Bureau dismiss as premature the “Petition for Clarification or in the Alternative for Partial Reconsideration” (“Petition”) of AT&T Inc., CenturyLink, SureWest Communications, and Verizon (collectively, the “Petitioners”). Commission rules and well-settled precedent require rejection of petitions that are contingent, speculative, and premature, and petitions for reconsideration of orders that are not final. The instant Petition is premature since the Bureau has not yet determined whether TelePacific should be treated as an end-user; nor has the Bureau (or USAC) determined whether any Petitioner is required to make a USF contribution based on revenues it received for leasing T-1s to TelePacific for TelePacific’s use in providing broadband Internet access services.

In the alternative, to preserve the procedural integrity of TelePacific’s appeal, the Bureau should address the issues raised in the Petition during the second phase of the appeal. In evaluating the Petition, the Bureau should ensure that the USF contribution rules are applied uniformly, in a competitively neutral manner throughout the industry. Any decision to apply USF contributions only on providers who lease T-1 last mile access facilities violates Section 254 of the Communications Act, the *Wireline Broadband Order*, and the well-established Commission policy of competitive neutrality. Additionally, any decision to impose USF contributions on the transmission facilities underlying broadband Internet access should be done on a prospective basis. TelePacific agrees with Petitioners that if the Bureau alters its long-standing policy on reporting retail versus carrier’s carrier revenue on a retroactive basis, it will have violated the Administrative Procedure Act by adopting a new rule without notice and comment and by engaging in prohibited retroactive rulemaking.

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U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific” or the “Company”), through its undersigned counsel and in response to the Commission’s June 3, 2010 *Public Notice*,<sup>1</sup> opposes the “Petition for Clarification or in the Alternative for Partial Reconsideration” (“Petition”) of AT&T Inc., CenturyLink, SureWest Communications, and Verizon (collectively, the “Petitioners”).<sup>2</sup> As demonstrated herein, the Bureau should reject the Petition as premature. In the alternative, the Bureau should address the issues raised in the Petition during the second phase of the appeal. Lastly, if the Bureau requires Universal Service Fund (“USF”) contributions on the transmission underlying broadband Internet access, it should apply such requirement to all providers of broadband Internet access services, whether they own or lease the transmission facilities used to deliver the service, and then only on a prospective basis.

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<sup>1</sup> See *Comment Sought on Petition for Clarification and Reconsideration of the Wireline Competition Bureau’s TelePacific Order Filed By AT&T Inc., CenturyLink, SureWest Communications, and Verizon*, WC Docket No. 06-122, Public Notice, DA 10-1012 (rel. June 3, 2010).

<sup>2</sup> See Petition of AT&T Inc., CenturyLink, SureWest Communications, and Verizon for Clarification or in the Alternative for Partial Reconsideration, WC Docket No. 06-122 (filed June 1, 2010) (“Petition”).

## **I. THE PETITION SHOULD BE DISMISSED AS CONTINGENT, SPECULATIVE, AND PREMATURE**

Commission rules and well-settled precedent require the Commission to reject petitions that are contingent, speculative, and premature,<sup>3</sup> and petitions for reconsideration of orders that are not final.<sup>4</sup> Section 1.401(e) of the Commission's Rules states that a petition that is premature or plainly does not warrant consideration may be denied or dismissed without prejudice.<sup>5</sup> Section 1.106(a)(1) of the Commission's Rules prohibits petitions for reconsideration of interlocutory actions.<sup>6</sup> The Bureau has not yet determined whether TelePacific should be treated as an end-user. Nor has the Bureau (or USAC) determined whether any Petitioner is required to make a USF contribution based on revenues it received for leasing T-1s to TelePacific for TelePacific's use in providing broadband Internet access services. The "finding" which Petitioners request be clarified is contingent, speculative, and an interlocutory action. The Commission should dismiss the Petition without prejudice.

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<sup>3</sup> See, e.g., *Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order, and Eighth Further Notice of Proposed Rule Making, 22 FCC Rcd 15581, ¶ 83 (MB 2007) (rejecting as premature requests seeking changes to their facilities "when these changes pertain to speculative future events...."); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, MM Docket No. 04-2146, *Report and Order*, 20 FCC Rcd 893, 898 (MB 2004) (explaining that the Commission's "policy is not to accept rulemaking proposals or counterproposals that are contingent upon applications or upon other pending rulemaking proceedings.") (internal citations omitted).

<sup>4</sup> See, e.g., Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission to Michael Couzens, Esq., *et al.*, DA 10-69 at 3 (rel. April 26, 2010) (rejecting a petition seeking reconsideration of an interlocutory action as "procedurally improper."). See also, e.g., *See Bennett v. Spear*, 520 U.S. 154, 178 (1977) (holding an agency's action is final and reviewable only if, *inter alia*, it "mark[s] the 'consummation' of the agency's decision making process - it must not be of a merely tentative or interlocutory nature.") (internal quotes and cites omitted).

<sup>5</sup> 47 C.F.R. § 1.401(e), reads: "Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner."

<sup>6</sup> 47 C.F.R. § 1.106(a)(1) reads: "[p]etitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained."

The Petition is directed at the Bureau's request in ¶ 16 of the *Order*<sup>7</sup> that TelePacific provide USAC with the names and contact information of TelePacific's wholesale providers of transmission services so that USAC can assure that all contributions to the USF are promptly paid.<sup>8</sup> Petitioners express concern that the Bureau may direct USAC to review this contact information and require TelePacific's wholesale carriers who supply T-1s to restate prior years' revenues and make additional USF contributions.<sup>9</sup>

The *Order* makes clear in Paragraph 13 that the Bureau *has not decided* whether T-1s leased to TelePacific by its underlying carriers for use in TelePacific's broadband Internet access service are subject to USF contributions. In Paragraph 13, the *Order* states that "we do not have sufficient information in the record to address TelePacific's contention that no federal universal service contributions should be assessed on revenues derived from the sale of T-1 lines to TelePacific."<sup>10</sup> In paragraph 16, the *Order* directs TelePacific to provide further factual information. During the second phase of the appeal, the Bureau presumably intends to evaluate both the factual information submitted by TelePacific and the parties' legal arguments concerning the indirect contribution issue. The Bureau first must find that USF applies to the sales of such T-1s *before* it could require Petitioners to restate their revenue to include such sales as subject to USF contributions. Paragraph 16 is simply an information-gathering device that directs TelePacific to "provide USAC with the names and contact information of its wholesale

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<sup>7</sup> See *Universal Service Contribution Methodology; Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications*, WC Docket No. 06-122, Order, DA 10-752 (WCB rel. Apr. 30, 2010) ("*Order*").

<sup>8</sup> On June 29, 2010, TelePacific provided to the Universal Service Administrative Company ("USAC") the names and contact information of its wholesale providers of last mile access services. On the same date, TelePacific provided to the Chief, Wireline Competition Bureau, a detailed explanation of the methodology by which TelePacific apportions revenues derived from its sale to end users of voice telephony and information services utilizing leased T-1 lines and information on how it reports such revenues on FCC Form 499-A.

<sup>9</sup> See Petition at 1-2.

<sup>10</sup> Hereafter, TelePacific will refer to this as the "indirect contribution issue."

providers of transmission services. . . “ Because the Bureau has not decided the predicate question, the Petition is contingent and speculative.

Indeed, Petitioners concede that any action is contingent upon the Commission taking these affirmative steps. As Petitioners acknowledge, “further proceedings involving TelePacific’s wholesale carriers, *if any*, should be limited to inquiring about what those carriers may have sold TelePacific and requesting copies of any reseller certifications that TelePacific and its affiliates provided.”<sup>11</sup>

There are good policy reasons for dismissing contingent, speculative petitions and petitions for reconsideration of interlocutory actions. Granting review of proposals that are not capable of being effectuated on the date of filing would cause an unnecessary expenditure of Commission resources and would impose an unfair burden on other parties.<sup>12</sup> Given that the Bureau must still evaluate the legal arguments and assess the information requested in Paragraph 16 of the *Order* regarding TelePacific’s underlying carriers in order to determine whether TelePacific is an end-user, the issues raised in the Petition are premature. Even then the Petition would be moot unless the Bureau first determines that USF “should be assessed on revenues derived from the sale of T-1 lines to TelePacific.”<sup>13</sup> Because neither the Commission nor the Bureau has yet determined whether such indirect contribution will be owed, the Petition is

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<sup>11</sup> Petition at 6 (emphasis supplied).

<sup>12</sup> For example, the Commission and its Staff have broad authority under Section 1.401(e) of the Rules to deny petitions if the petition is moot, repetitive, premature, frivolous or plainly does not warrant consideration by the Commission. Indeed, the Commission expressly amended Section 1.401(e) in 1980 to allow its staff to take such summary action. In so doing, the Commission noted that petitions can be dismissed where consideration of such petitions would be “a needlessly burdensome step which imposes unwarranted demands of time and expense on both private parties and Commission staff, with no offsetting contribution to regulatory fairness or efficiency.” *Amendments to Part 0, Sec. 0.281(b)(6), and Part 1, Secs. 1.401 and 1.405(d), of the Commission’s Rules, with Respect to the Delegation of Authority to the Chief, Broadcast Bureau, and Procedures Regarding Petitions for Rule Making*, Memorandum Opinion and Order, 79 FCC 2d 1, 2 (1980).

<sup>13</sup> See *Order*, ¶ 13.

incurably premature and, consistent with longstanding Commission precedent and rules, should be rejected, subject to refiling if and when the Bureau concludes that TelePacific is an end user.

**II. IN THE ALTERNATIVE, IF THE BUREAU DOES NOT DENY THE PETITION, IT SHOULD ADDRESS THE ISSUES RAISED IN THE PETITION DURING THE SECOND PHASE OF THE APPEAL**

To preserve the procedural integrity of TelePacific's appeal, if the Bureau decides not to dismiss the Petition, it should defer ruling on the issues raised by the Petitioners until the second phase of the appeal. In evaluating Petitioners' request, the Bureau should ensure that the USF contribution rules are applied uniformly, in a competitively neutral manner throughout the industry. Any decision to impose USF contributions on the transmission facilities underlying broadband Internet access should be done on a prospective basis.

**A. The FCC Must Apply USF Contribution Rules Uniformly to the Industry So That the Rules Are Competitively Neutral**

USAC is required to administer the universal service support system "in an efficient, effective and competitively neutral manner."<sup>14</sup> As TelePacific's February 1, 2010 *ex parte* letter showed, assessing USF on the T-1s used in TelePacific's broadband Internet access service but not on T-1s used in broadband Internet access service offered by an ILEC over its own T-1 loop (1) violates Section 254 of the Act, (2) contradicts the Commission's policy of a level playing field for all broadband Internet access services, and (3) violates the policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased local loop facilities.<sup>15</sup> Moreover, as the letter showed, these violations would occur regardless of whether USF is imposed directly on TelePacific or indirectly on its wholesale supplier. In the interest of brevity, TelePacific will refrain from

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<sup>14</sup> Request of U.S. TelePacific Corp. d/b/a TelePacific Communications for Review and Reversal of Universal Service Administrator Decision, WC Docket No. 06-122, at 16 (filed Jan. 8, 2010) ("TelePacific Appeal") citing 47 C.F.R. § 54.701(a).

<sup>15</sup> See Letter from Andrew Lipman *et al.*, Counsel for U.S. TelePacific, Corp. d/b/a TelePacific Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 2 (filed Feb. 1, 2010) ("TelePacific Feb. 1 Ex Parte").

repeating those arguments here and instead incorporates them by reference.

Numerous parties to this proceeding have supported competitive neutrality in application of USF rules to TelePacific's (and other CLECs') provision of broadband Internet access services. For example, New Edge makes clear that:

[f]oisting a 'tax' of up to 14.1% on only one type of provider of broadband internet access service, based solely upon the underlying facility input used to provide that service and not the type of service delivered, can hardly be considered technologically or competitively neutral as required by law. Moreover, subjecting only certain broadband internet access services to contribution...undermines the development of a comprehensive National Broadband Plan focused on the ubiquity and affordability of broadband services.<sup>16</sup>

As tw telecom explained, disparate treatment between a broadband Internet access service provider that owns facilities and one that leases facilities leads to inequitable outcomes and regulatory inefficiencies. "Requiring one but not the other competitor to contribute would skew efficient outcomes. Indeed, this very concern was part of the basis for the FCC's holding in the *Wireline Broadband Order*, since the FCC sought to ensure identical regulatory treatment of incumbent LEC and cable company offerings."<sup>17</sup>

In originally excluding wireline broadband Internet access service revenues from USF contributions, "the FCC did not differentiate between (1) firms that provide such services via their own local transmission facilities and (2) firms that provide such services via local transmission facilities leased as telecommunications services from a wholesale provider."<sup>18</sup> This exclusion therefore applies equally to wireline broadband Internet access providers, whether they lease or own their facilities. Any attempt at requiring one but not another wireline competitor to

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<sup>16</sup> Comments of New Edge Network, Inc., WC Docket No. 06-122 at 7 (filed Jan. 29, 2010) ("New Edge Comments") *citing* 47 C.F.R. § 54.701(a).

<sup>17</sup> Letter from Thomas Jones *et al.*, Attorneys for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 at 3 (filed April 27, 2010) ("tw telecom Ex Parte").

<sup>18</sup> tw telecom Ex Parte at 3.

contribute to the USF through re-interpretation of the Commission's distinction between end user and carrier's carrier revenue would "skew efficient outcomes" and would prove to be unsound communications policy. All of this should come as no surprise to the Commission, since it sought to ensure equal and identical regulatory treatment of wireline and cable company offerings in the *Wireline Broadband Order*. The Commission stated with great clarity that "we believe that we should regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions."<sup>19</sup>

Indeed, the *Wireline Broadband Order* was based in large part on the underlying goal of creating a level playing field for all broadband services, regardless of the transmission technology used to deliver broadband Internet access to the consumer.<sup>20</sup> The *Wireline Broadband Order* also sought to create a level playing field, regardless of whether the underlying transmission facilities were owned or leased. In Paragraph 12, the FCC concluded that "wireline broadband Internet access service provided over a provider's own facilities is an information service." In Paragraph 16, the FCC extended this conclusion to wireline broadband Internet access service provided over leased facilities because "from the end user's perspective, an information service is being offered regardless of whether a wireline broadband Internet access service provider self-provides the transmission component or provides the service over transmission facilities that it does not own."

In addition, the regulatory burdens that would result from assessing USF on T-1s used in TelePacific's broadband Internet access service but not on T-1s used in broadband Internet

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<sup>19</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 45 (2005) ("*Wireline Broadband Order*").

<sup>20</sup> See *Wireline Broadband Order* at ¶ 89.

access service offered by an ILEC over its own T-1 loop “would have a profoundly negative effect on competition in the broadband Internet access market.”<sup>21</sup> As a consequence of such disparate treatment, service providers using leased T-1s would be forced to recover any USF contributions from their subscribers, which in turn, would likely drive those subscribers to other broadband Internet access providers who, because they own, rather than lease, their facilities, are not subject to the USF obligations and are able to offer their services for a lower overall price.<sup>22</sup> Such an approach would thus undermine the competitive benefits inherent in leasing underlying facilities.

Further, Section 254(d) of the Act requires, *inter alia*, that “[e]very telecommunications carrier [providing] interstate telecommunications services . . . contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”<sup>23</sup> As pointed out by COMPTTEL and CALTEL, “there is nothing equitable or nondiscriminatory” about requiring CLECs to contribute to the USF based on revenues from information services provided over special access T-1s when all other carriers are exempt from contribution on the basis of such revenues.<sup>24</sup> “Such discriminatory treatment alone is sufficient to demonstrate irreparable harm.”<sup>25</sup> Indeed, one of the Petitioners, AT&T, suggested that, “regardless of how it is offered, all broadband

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<sup>21</sup> Comments of the Coalition for Fairness and Restraint in USAC Fund Administration on Issues Raised In or By the TelePacific Request, WC Docket No. 06-122 at 10 (filed Jan. 29, 2010) (“Coalition Comments”).

<sup>22</sup> Coalition Comments at 11. *See also* Letter from John Heitman, *et al.*, Counsel to the Coalition for Fairness and Restraint in USAC Fund Administration on Issues Raised In or By the TelePacific Request to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 8 (filed Feb. 19, 2010) (“Coalition Ex Parte”).

<sup>23</sup> 47 U.S.C. §254(d)

<sup>24</sup> Comments of COMPTTEL and CALTEL, WC Docket No. 06-122 at 11 (filed Jan. 29, 2010) (“COMPTTEL Comments”).

<sup>25</sup> COMPTTEL Comments at 11.

transmission that is incorporated into an Internet access service offering...be treated in the same manner from a universal service contribution perspective.”<sup>26</sup> The Petition similarly supports the uniform application of USF contributions in the context of wholesale/reseller relationships.<sup>27</sup>

For these reasons, the Commission should not even consider disparate application of USF contribution requirements (whether such requirements are imposed directly or indirectly) between providers who own last mile access facilities used to provide broadband Internet access service and those who lease these facilities from wholesale carriers. Any decision to apply USF contributions only on providers who lease T-1 last mile access facilities violates Section 254 of the Communications Act, the *Wireline Broadband Order*, and the well-established Commission policy of competitive neutrality.

**B. Any Decision to Impose USF Contributions on Carrier’s Carrier Revenue Retroactively Would Be a Violation of the Administrative Procedure Act.**

TelePacific agrees with Petitioners that if the Bureau alters its long-standing policy on reporting retail versus carrier’s carrier revenue on a retroactive basis, it will have violated the Administrative Procedure Act (“APA”) by adopting a new rule without notice and comment and by engaging in prohibited retroactive rulemaking.<sup>28</sup>

Sections 553(b) and (c) of the APA require agencies to give public notice of a proposed rule making that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved” and to give interested parties an opportunity to submit comments on the proposal. The Bureau has provided no notice that it intended to adopt a new rule in this proceeding governing the calculation of USF contributions on the transmission

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<sup>26</sup> Reply Comments of AT&T Inc., WC Docket No. 06-122 at 5 (filed Feb. 3, 2010).

<sup>27</sup> See Petition at 6 n.6 (“The Bureau also could clarify that in other similar circumstances it does not intend to require wholesale carriers to refile prior year forms.”).

<sup>28</sup> See Petition at 2-3; 47 U.S.C. § 553(b); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988).

underlying broadband Internet access services provided by a current contributor to USF. Any determination by the Bureau that it may impose USF contribution upon these carrier's carrier revenues (either directly on the provider of the transmission facility or indirectly on TelePacific) would constitute a substantive change that directly conflicts with prior Commission interpretations of its rules. As noted by the Third Circuit, "if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA."<sup>29</sup>

As TelePacific has shown, the sale of T-1s by wholesale carriers to TelePacific is carrier's carrier revenue under Commission rules and the FCC Form 499-A worksheet instructions.<sup>30</sup> TelePacific is a carrier that contributes directly to USF on those services that the Commission has determined are subject to contribution. Requiring TelePacific to contribute to USF indirectly on a circuit-by-circuit basis is inconsistent with Commission rules and FCC Form 499 Instructions that classify revenues as wholesale on an entity-by-entity basis. There is nothing in the FCC's universal service orders or rules that even suggests this determination must be made on an individual service basis. "To the contrary, it would be virtually impossible for wholesale carriers to classify their revenues for USF purposes based on the end user services that their CLEC customers may choose to provide."<sup>31</sup> It would therefore be "unreasonably burdensome for a CLEC to have to comply with a service order-by-service order or even partial service certification system. In short, the classification of revenues by a wholesale provider depends upon the reseller's status as a CLEC, not on the particular end user service that the

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<sup>29</sup> See *Air Transport Ass'n of America, Inc. v. FAA*, 291 F.3d 49, 56 (D.C. Cir. 2002) (rulemaking is required if agency's interpretation of rule adopts a new position inconsistent with existing regulations).

<sup>30</sup> TelePacific Feb. 1 ex parte at 6-7.

<sup>31</sup> Coalition Ex Parte at 15.

reseller provides.”<sup>32</sup> In short, Commission rules do not require the wholesale providers of transmission facilities to TelePacific to contribute to USF directly, nor do they require TelePacific to contribute indirectly, on such sales.

Any ruling to require indirect contribution would be legally suspect if applied retroactively because it would constitute impermissible retroactive rulemaking that would result in “manifest injustice.”<sup>33</sup> Rules are retroactive if they “alter the past legal consequences of past actions” or “change what the law was in the past.”<sup>34</sup> As the Commission is well aware, “[g]enerally, rules adopted by administrative agencies may be applied prospectively only.”<sup>35</sup> In the *LSS Order*, the Commission declined to apply a new methodology for calculating high-cost local switching support for funding periods that had passed, stating that “application of the new methodology to those years would be improper retroactive rulemaking.”<sup>36</sup> Similarly, if the Commission wishes to change the rules governing separation of retail and carrier’s carrier revenue, it must apply those new rules prospectively.

Comments filed in this proceeding also evidence widespread agreement that any decision contrary to past precedent “should apply only on a prospective basis - if at all.”<sup>37</sup> For example, as New Edge points out:

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<sup>32</sup> Coalition Ex Parte at 5.

<sup>33</sup> See *Bowen*, 488 U.S. at 216-20; *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)).

<sup>34</sup> See *Bowen*, 488 U.S. at 219-20.

<sup>35</sup> *High Cost Universal Support*, CC Docket No. 80-286, Report and Order and Memorandum Opinion and Order, FCC 10-14 at ¶ 11 (rel. March 16, 2010) (“*LSS Order*”) citing *Bowen*, 488 U.S. at 208.

<sup>36</sup> *LSS Order* at ¶ 11.

<sup>37</sup> See Coalition Ex Parte at 7 citing Coalition Comments at 3-4; New Edge Comments at 8 n.21; Letter from Andrew Lipman *et al.*, Counsel for U.S. TelePacific, Corp. d/b/a TelePacific Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 6 (filed Feb. 16, 2010); TelePacific Feb. 1 Ex Parte at 9; Letter from Tamar Finn., Counsel for U.S. TelePacific, Corp. d/b/a TelePacific Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 16 (filed Feb. 1, 2010); TelePacific Appeal at 19-20; see also COMPTTEL Comments at 12.

it was not foreseeable that providers would be required to: (1) segregate the transmission component; (2) somehow identify the revenues derived from that component; and (3) report and contribute to USF based upon such revenue estimates. Applying liability retroactively based upon such a new interpretation -- and without further guidance as to how such revenues for the transmission component should be identified -- would be both inequitable and unlawful. *See, e.g., Retail, Wholesale & Dep't Store Union*, 466 F.2d 380, 390 (DC Cir. 1980); *see also Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731 (2008), at ¶ 24 (finding that prospective application of a decision requiring USF contribution was appropriate “because of the lack of clarity” in prior decisions and industry practice).<sup>38</sup>

Retroactively requiring USF contributions on providers that lease the underlying transmission facilities to TelePacific would violate Commission rules, FCC Form 499 instructions, the principles set forth in the *Wireline Broadband Order*, the APA, Section 254 of the Communications Act, and the well-established Commission policies of competitive neutrality, non-discriminatory treatment, and retroactive rulemaking.

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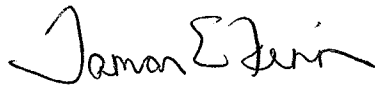
<sup>38</sup>

New Edge Comments at 8 n.21.

### III. CONCLUSION

For the foregoing reasons, TelePacific respectfully requests that the Bureau reject the Petition as premature. In the alternative, the Bureau should address the issues raised in the Petition during the second phase of the appeal. Lastly, any decision requiring USF contributions on the transmission underlying broadband Internet access should apply both to carriers who own facilities, and those who lease these facilities, and then only on a prospective basis.

Respectfully submitted,



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Dated: July 6, 2010

## **CERTIFICATE OF SERVICE**

I, M. Renee Britt, hereby certify that on this 6th day of July, 2010, a copy of the foregoing Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications to Petition for Clarification or in the Alternative for Partial Reconsideration in WC Docket No. 06-122 was served via first-class mail, postage prepaid, unless otherwise indicated, on the following parties:

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